IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, et al.,
Appellants,

v.

DONALD BRADY, et al.,
Appellees.

Appeal from a United States District Court of
Three Judges for the District of Maryland

AMICUS CURIAE BRIEF

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Juvenile Law Center is a national legal services support center, funded by contract with the Legal Services Corporation. The function of the Center is to provide assistance to clients eligible under the guidelines established by the Legal Services Corporation Act of 1974 in the area of juvenile and family law. The attorneys employed by the Center also act from time to time as *amicus curiae* in cases involving issues of substantial public interest and importance which affect the rights of indigent children and their parents.

Attorneys from the Center have studied the model juvenile codes and have reviewed the various statutory provisions which create the position of juvenile master in many jurisdictions. Further, *amicus* is familiar with the law and practice out of which the current litigation arose, and is vitally interested in the equitable resolution of the issues before this Court.

The filing of this brief reflects the concern of *amicus* that children in Baltimore are being deprived of a fundamental constitutional right, the right to be free from being twice placed in jeopardy because of the use of juvenile court masters.

Amicus has requested and obtained the written consent of all parties to file this brief.

SUMMARY OF THE ARGUMENT

Appellees in this action challenge, as a violation of their fifth amendment double jeopardy protections, the provisions of MD. RULES OF PROC. 911(c) (1977),[1] allowing the State in delinquency cases to take exception to a master's finding of innocence and seek a rehearing before the juvenile court judge.[2]

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[1] While the initial rule challenged was Maryland Rule 908(e) it has been subsequently amended effective July 1, 1975, as Maryland Rule 910(e) and again effective January 1, 1977, as Maryland Rule 911(c).

[2] Although *amicus* realizes that Appellees attack both the provisions of Maryland Rule 911(c) and MD. CTS. & JUD. PROC. CODE ANN. §3-813(c) (Supp. 1977), in this brief we shall only refer to the Rule's provisions. *Amicus* accepts Appellees' belief that the double jeopardy protections are violated through the application of either statute or rule insofar as the state is permitted exception to the findings of the master, and that consequently this Court should rule on both provisions. *See*, Appellees Brief at Arguments III and IV.

Amicus will argue in this brief that the weight of scholarly thinking as expressed in model acts and national standards has recognized the double jeopardy difficulties inherent in this situation, and expressly provided mechanisms to avoid the instant predicament. Likewise the vast majority of states have similarly immunized themselves from suit by restricting or eliminating the role of masters or by adopting measures similar to those proposed in the model acts.

The State of Maryland has available to it a variety of ways in which to bring its use of masters into line with constitutionally acceptable standards; the present statutory scheme should not be upheld.

INTRODUCTION

Since the time this Court began to apply the due process protections generally afforded adults to the juvenile court system, it has struggled with a number of factors in each case. In *In re Gault*, 387 U.S. 1 (1967), the Court was particularly concerned with four factors: the underlying basis of the right; the effect the right would have on the beneficial aspects of the juvenile court system; recommendations of various studies and model acts dealing with the juvenile court system; and the extent to which the right was already applicable to delinquency proceedings in the various states. Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 275 (1972).

The next time the Court decided a juvenile delinquency case, *In re Winship*, 397 U.S. 358 (1970), it chose to focus on the first two factors considered in *Gault*: the basis of the right; and the effect such standard would have on present juvenile court practice. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971),

this Court once again broadened its inquiry by contemplating the effect of the right on the fact finding process.

In each case, after analyzing the claim as it affected the individual litigant, the Court would proceed to assess the impact a decision might have on the juvenile justice system across the country by looking to other jurisdiction's procedures, and the extant model provisions and standards. *Kent v. United States*, 383 U.S. 558, 55n. 19 (1966); *In re Gault*, 387 U.S. at 37-41 and nn. 62 and 63, 48-49, 56-57 and nn. 98-99, 58n. 102; *In re Winship*, 397 U.S. at 360n. 3; *McKeiver v. Pennsylvania*, 403 U.S. at 548-550 and nn. 7-9; and *Breed v. Jones*, 421 U.S. 519, 538 and n. 19 (1975).

Whether the analysis is characterized as a survey of current practices or a weighing of the burdens a rule might impose, it remains clear that a survey of the model acts and standards proposed for the juvenile justice system, as well as the present problem as it exists under current statutes, can aid this Court in reaching its decision. For these reasons *amicus* will focus on the present referee[3] system with its attendant double jeopardy difficulties both as it is effectuated throughout the states and as it is approached by the commentators.

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[3] The terms "referee", "commissioner" and "master" will be used throughout this brief interchangeably. Where differences in functions exist they will be explicitly noted.

ARGUMENT

I. The Model Acts Provide Protections That Obviate the Double Jeopardy Claim Presented by This Case.

Four major pieces of model legislation exist in the area of juvenile law: the STANDARD JUVENILE COURT ACT, prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the Children's Bureau, 6th edition (1959), hereinafter referred to as the STANDARD ACT; the UNIFORM JUVENILE COURT ACT, drafted by the National Conference of Commissioners on Uniform State Laws (1968), hereinafter referred to as the UNIFORM ACT; MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS, prepared by William H. Sheridan and Herbert Beaser, Office of Youth Development of the Department of Health, Education, and Welfare (1975), hereinafter referred to as the MODEL ACT; and the MODEL JUVENILE COURT ACT, drafted by Paul Piersma, Jeanette Ganousis and Prudence Willett Kramer, which is found in *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, at 20 ST. LOUIS U.L.J. 1 (1975), hereinafter referred to as the JUVENILE ACT.

These publications reflect an immense amount of time spent by experts in the social and legal professions in considering important questions dealing with the purposes and operations of juvenile courts. They embody the efforts of those experts to keep abreast of new developments in the juvenile area and to make practical suggestions to legislators on how to incorporate these developments into their juvenile codes. They also suggest practices and procedures to deal effectively with recurrent problems in the juvenile area, while protecting rights which are fundamental to children as well as to adults.

The fifth amendment guarantee against being placed twice in jeopardy is one such fundamental right. This Court has recognized that right as applicable to juveniles in *Breed v. Jones*, 421 U.S. 519 (1975).

Just as Maryland in Rule 911, recognizes the use of masters to hear certain cases, so too do all of the model juvenile acts. In Maryland the court may assign a juvenile case to a master for consideration. Following a hearing before him either party to the proceeding may take exception to his decision and ask for a [redacted] hearing before the juvenile court judge.

It is the practice of allowing the State's attorney to except to a master's finding and consequently force a second hearing that is herein challenged as violative of the double jeopardy clause of the fifth amendment.

A cursory glance at the model provisions mentioned above might lead to the conclusion that the Maryland practice is, at a minimum, in compliance with those publications and thus in line with suggested practices that have been drafted by those with the greatest expertise and awareness of possible collateral consequences.

All of the model acts that permit masters to conduct adjudicatory hearings provide that each party should be notified of the master's decision and of the right to a rehearing before the judge.

The STANDARD ACT states that:

> [W]ritten notice of the referee's findings and recommendations shall be given to the parent, guardian, or custodian of any child whose case has been heard by a referee, and to any other parties in interest. A hearing by the judge shall be allowed if any of them files with the court a request for review, provided that the request is filed within three days after the referee's written notice.

Section 7 at 22.

According to the UNIFORM ACT, which on this point is essentially identical to the MODEL ACT:

> [P]rompt written notice and copies of the findings and recommendations shall be given to the parties to the proceeding. The written notice also shall inform them of the right to a rehearing before the judge.
>
> (d) A rehearing may be ordered by the judge at any time and shall be ordered if a party files written request therefor within 3 days after receiving the notice required in subsection (c).

Section 7 at 11.

A more thorough reading of each of the model publications reveals, however, that the draftsmen included language that would not only distinguish each from the Maryland rule but would also prevent a double jeopardy problem from arising.

THE STANDARD JUVENILE COURT ACT

According to section 7 of the STANDARD ACT,[4] a referee may be appointed to hear "any case, or all cases of a class or within a district" designated by the judge and he is authorized to hear those cases in the first instance in a manner consistent with the other provisions of the act. However, "any party may, upon request, have a hearing before the judge in the first instance."

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[4] *See*, Appendix A for the full text of Section 7 of the STANDARD JUVENILE COURT ACT.

The import of this statement is obvious. When a child chooses to have his case heard by the judge in the first instance, the double jeopardy problem raised by Rule 911 cannot occur.

The provision in section 7 that affords the right to a hearing before a judge rather than a referee is somewhat circuitous, in that there may be an initial scheduling before the judge. The importance of the right is emphasized in the comments to this section, which state that "[t]he right of a hearing before the judge, when demanded, must be respected." Obviously the drafters of the provision saw this right as absolute when exercised, yet, by allowing the judge initially to set the case before the referee, they viewed it as one that could be waived.

Proper waiver necessarily entails a finding that the decision to give up a right be made intelligently. *See, Johnson v. Zerbst,* 304 U.S. 458 at 464 (1938). Section 7 conspicuously lacks any provision to insure that this will be done. It does not, for example, state that the referee shall inform the child that he may have his case heard by the judge if he wishes or that after the hearing before a referee there may be a *de novo* hearing before the judge on the same charges. *Johnson* also involved another concern over the question of the validity of waiver: whether the official who accepts the decision to waive has ascertained that the choice was made intelligently, regarding not only the circumstances of the case but also the person's background and experience. *Johnson v. Zerbst* at 464. Obviously a provision that the master serve this function would be an asset to this section; however, the failure of the draftsmen to go into more detail here is understandable in light of two considerations.

First, although unstated in section 7, it is evident from reading the comments that the draftsmen of the Standard Act viewed the referee as an adjunct to the juvenile judge, with the responsibility for handling less serious cases.[5] The comments include suggestions concerning cases to be reserved to the judge and all are illustrations of potentially serious or difficult cases.[6] Clearly the draftsmen envisioned the judge as automatically reserving to himself any case in which a hearing before a referee could create special problems for the child.

Second, the STANDARD ACT includes, in section 19, the requirement that the court inform the child and his parents, guardian or custodian that they have a right to counsel at every stage of the proceeding and that the court will appoint counsel if they are financially unable to provide their own.[7] With counsel present to assist a child, he will not fail to ask for a hearing before the judge when to do so would be in his best interests. While waiver of a right, without assistance of counsel, may be suspect, where counsel is present, the presumption is that any waiver is made knowingly and on good advice. *See, e.g., R.L.R. v. State,* 487 P.2d 27 (Alas. 1971) where the court, concerned with the validity of a waiver of jury trial, stated that a child acting without legal counsel can make a few knowledgeable and

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[5] The comments state that several committee members opposed the referee's section, "stressing the values of a good intake department in screening and preparing cases, and the need to have a sufficient number of judges for all judicial hearings." This is indicative of a concern that the referee not assume the same function and duties as the juvenile court judge.

[6] The judge may direct that certain controversies be reserved to him, *e.g.,* cases in which a child is likely to be removed from the custody of his parents; cases in which the parties are likely to demand a hearing before the judge; delinquency cases involving death or serious violence; cases in which the parties are represented by attorneys, unless their consent to a hearing before the referee is given; cases in which questions of law are involved.

[7] The STANDARD ACT recogniezd a child's right to counsel eight years before the landmark decision *In re Gault,* 387 U.S. 1 (1967), held that this was a necessary element of due process in a delinquency proceeding where a child faced the possibility of institutionalization.

intelligent decisions about his rights. The draftsmen could properly assume that by assuring a child the assistance of counsel they were also assuring that all of his rights would be protected and that any waiver thereof would be made knowledgeably. Thus the waiver of the right to request a hearing before a judge in the first instance could be valid without additional safeguards.[8]

The crucial point is that the Standard Act recognizes a child's right to be heard before the juvenile judge in the first instance, and so remove himself from a position where he may have to undergo a second hearing. In essence, by waiving his right to elect a hearing before a judge a child consequently elects to waive any claim to a violation of the double jeopardy clause if the state takes exception to the findings of the master.

THE UNIFORM JUVENILE COURT ACT

As in the STANDARD ACT, section 7 of the UNIFORM ACT provides that the judge may direct that "hearings in any case or class of cases be conducted in the first instance by the referees in the manner provided by this Act."[9] It also states that "before commencing the hearings the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearings shall be conducted by the judge."

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[8] Section 19 states that if the child is unrepresented, after final disposition he and his parent or guardian will be informed by the court of their right to appeal the decision. The comments state that it is "presumed" that when they are represented by counsel the court need not make this statement. Here quite clearly the inference is that the presence of counsel is sufficient to guard against the unintentional waiver of the right to appeal. In like manner counsel would guard against the unintentional waiver of the child's right to be heard by the juvenile judge.

[9] Appendix B contains the full text of Section 7 of the UNIFORM JUVENILE COURT ACT.

In language even more direct than that of the STANDARD ACT published nine years earlier, the UNIFORM ACT also requires that a juvenile be informed of his right to be heard by the judge but allows him to waive that right.

The UNIFORM ACT provides more protection for a child than does the STANDARD ACT. Not only is there a right to representation by counsel at all stages of the proceeding (section 26), but section 7 requires that the parties be told in advance that they are entitled to be heard by the judge.

In a state with a provision very similar to section 7 of the UNIFORM ACT,[10] a child alleged that a second hearing before a judge placed him twice in jeopardy. There a referee had recommended that the court dismiss the delinquency petition against the child and the state, in accordance with the statute, asked for a new hearing. The court concluded that there was no double jeopardy violation because the parties had agreed to a hearing before the referee and so impliedly also agreed to the statutory procedures outlined for those hearings including the right of the state to except to the referee's decision. *People v. J.A.M.*, 483 P.2d 362 (Colo. 1971).

Importantly, the comments to section 7 state a concern about the role of the referee that was merely implied in the STANDARD ACT:

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[10] Like the UNIFORM ACT, COLO. REV. STAT. §19-1-110 (3) (1974), provides that a child has the right to be heard in the first instance by the juvenile judge and that he must be informed of that right. "Prior to any hearing, except those at which the child is advised of his rights and either admits or denies the allegations of the petition, the referee shall inform the parties that they have the right to a hearing before the juvenile judge in the first instance, that they may waive that right, but that, by waiving that right, they are bound by the findings and recommendations of the referee." Either party also has the right to a review of these findings and recommendations.

> They [referee] serve a purpose where a case load is greater than the judge can effectively handle, but not sufficiently great to warrant the appointment of an additional judge. In such situations, the use of referees is warranted to relieve the judge of these routine and simple matters which do not call for the qualifications of a judge.
>
> But referees should not be resorted to as a substitute for additional judges when these are needed.

In *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974), the Maryland Court of Appeals discussed at length the traditional role that a master in chancery has played in this country, comparing him to a magistrate and stressing that he is normally to perform ministerial tasks and that his actions are always subject to the supervision of the courts. This view in no way contradicts the statements in the Uniform Act but is instead buttressed by them.

It is the opinion of *amicus* that while Rule 911(c) on its face does not conflict with the concept of the master as supplemental to but not a substitute for the juvenile judge, the implementation of the Rule in Baltimore City is in direct contravention therewith.

Where there are seven juvenile masters and only one juvenile court judge, it must be obvious to the most casual observer that the juvenile court docket is such that additional judges are needed. While it is difficult to formulate precisely when the need arises and masters become judge-substitutes, it is easy to see that that point was reached in Baltimore long before the seventh master was appointed.

The practice in Baltimore is inconsistent with the concept of masters as adjuncts to and not substitute for juvenile judges.

MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS

Undoubtedly the most sophisticated of the referee provisions and the one that most clearly avoids the constitutional problems raised by Rule 911(c), while still permitting adjudications by referees, is section 4 of the MODEL ACT.[11] While it allows the judge to direct the referee to hear "any case or class of cases" in the first instance, only the judge may hear delinquency and neglect cases where: "(1) the allegations set forth in the neglect or delinquency petition are denied; (2) the hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or (3) a party objects to the hearing being held by a referee." Subsection (3) is very similar to the safeguard included in both the STANDARD and UNIFORM ACTS. But subsections (1) and (2) appear to be in line with suggestions in the comments to the UNIFORM ACT to the effect that a referee should handle only those simple routine matters that do not call for the qualifications of a judge. Obviously transfer is a "critically important" stage in juvenile proceedings in which "vitally important statutory rights of the juvenile" are determined. *Kent v. United States*, 383 U.S. 541, 556 (1966). Any determination in such an important area should be made by the juvenile court judge.

Contested cases, referred to in subsection (1), are also of grave importance. Whenever a child in a delinquency proceeding or an adult in a neglect proceeding contests the allegations in the petition, critically important rights are at stake and these should not be determined by anyone of lesser stature and expertise than a judge. In addition, the requirement that these hearings be conducted by the juvenile court judge in the first instance prevents the inevitable request for rehearing by one party or the

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[11] *See*, Appendix C for the full text of Section 4 of the MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS.

other that would result if a referee heard the case. Obviouly one of the intended benefits of utilizing masters is the reduction of the judges' case loads.[12] That benefit is greatly reduced if hearings before master actually result in an increase in the number of hearings scheduled on the juvenile court docket. Efficiency as well as avoidance of the constitutional issue raised in this case are both served by requiring the judge to hear a contested case in the first instance.

The MODEL ACT provisions are particularly interesting because this is the only model legislation that explicitly recognizes that juveniles are entitled to the protection of the fifth amendment double jeopardy clause.[13] Thus, it is understandable that the section on referees is carefully written so as to prevent any double jeopardy violation.

MODEL JUVENILE COURT ACT

The JUVENILE ACT goes one step further in insuring that the use of referees does not present double jeopardy problems by prohibiting their use in adjudicatory or dispositional hearings. While not dispensing with the role of referee totally, the act limits their duties to preliminary matters:

(A) Appoint counsel for a child, parent or guardian under section 10;

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[12] *See*, Comment to section 7 of the UNIFORM ACT, at 11.

[13] Section 27 states: "Criminal proceedings and other juvenile proceedings based upon the offenses alleged in the petition or an offense based upon the same conduct is barred where the court has begun taking evidence or where the court has accepted a child's plea of guilty to the petition."

While the current edition of the Model Act was published in 1975, this provision is identical to the one included in the 1969 edition indicating that the draftsmen recognized the right as one necessary for the protection of juveniles even before the Supreme Court held that the right applied to adults in state proceedings [*Benton v. Maryland*, 395 U.S. 784 (1969)] or to children in juvenile proceedings, [*Breed v. Jones*, 421 U.S. 519 (1975)].

(B) Order that a child be taken into custody under section 4;

(C) Conduct a preliminary inquiry under section 7;

(D) Conduct a preliminary hearing under section 6;

(E) Authorize a lineup or photograph under section 12;

(F) Authorize a summons by publication under section 9.

Section 3(1) at 89.

In defining the functions of the referee so narrowly the commentary to this act makes it explicit that the position was chosen specifically to avoid double jeopardy problems. Suggesting that the elimination of hearings at the state's request might be a possible solution the JUVENILE ACT's authors finally opt for the limited powers alternative. JUVENILE ACT at 11-12.

Each of the model acts in its own way provides the juvenile with protection from a violation of the double jeopardy protections of the fifth amendment. These safeguards, whether furnished in implicit or explicit recognition of the issue presented by this case, indicates the ample opportunity that has existed for the State of Maryland to modify its use of masters to eliminate the challenged procedure.

II. At a Minimum the Juvenile Standards Would Require the Protections Afforded Children in the Model Acts Thus Eliminating the Double Jeopardy Claim Presented by This Case.

Over the years a number of prestigious organizations have worked towards developing comprehensive standards for the juvenile justice system. Such efforts were redoubled immediately after this Court's landmark decision of *In re Gault*, and the passage of the federal Juvenile Justice and Delinquency

Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified in scattered sections of 5, 18, 42 U.S.C. (1974)) (amended 1976), resulting in the development of numerous current sets of standards. These publications reflect the efforts of experts to integrate the humanitarian philosophy that gave rise to the juvenile court system with the legal procedures necessary to protect rights which are fundamental to children as well as to adults.

One of the earliest attempts to set guidelines for the administration of the juvenile justice system was accomplished in STANDARDS FOR JUVENILE AND FAMILY COURTS, prepared by William Sheridan in cooperation with the National Council on Crime and Delinquency and the National Council of Juvenile Court Judges published in 1966 by the Children's Bureau of the Department of Health, Education and Welfare. Although written before the *Gault* decision, these standards attempt to strike a balance requiring a level of formality consistent with the juvenile court philosophy of providing individualized justice.

These standards considered the use of referees in juvenile courts and concluded that it may be a desirable feature in order to assure prompt hearings. They caution, however, that "hearings held before a referee should be clearly designated as such, and the child and his family be appraised of their right to a hearing before the judge." W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS at 77 (1966). This position was reaffirmed when the National Council of Juvenile Court Judges undertook a revision of their standards in light of the extension of formal due process protections to juveniles charged with delinquent acts. NATIONAL COUNCIL OF JUVENILE COURT JUDGES, EVALUATION STANDARDS (1974). Both of these sets of standards require that the child's right to demand a hearing before the judge be protected. As discussed in Section I of this brief, this provision would obviate the need for appeals in these situations.

The National Advisory Commission on Criminal Justice Standards and Goals, which grew out of the Law Enforcement Assistance Administration (LEAA) of the U. S. Department of Justice in 1971, took a different point of view when it appraised the use of subjudicial decision makers in juvenile and family courts. Without specifically addressing juvenile courts, it recommended that all judicial functions in the trial courts be performed by full time judges. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS at 166 (1973). This position was premised upon a belief that the inferior position of the referee or lack of equivalent training and background may result in a diminution of the quality of justice dispensed by these individuals.

In the spring of 1975, LEAA established a Task Force to develop specific standards for implementation of the general guidelines of the earlier Commission. This group addressed the issue of judicial/subjudicial officers by stating as its Standard 8.3: "All judicial proceedings relating to juveniles including but not limited to detention, shelter care, waiver, arraignment, adjudicatory and dispositional hearings should be heard only by a judge." TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION OF THE NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS & GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION, at 282 (1976).

This stance almost mirrored that adopted by the Institute for Judicial Administration/American Bar Association's Juvenile Justice Standards Project in the tentative draft of its volume on Court Organization and Administration in section 2.2 "Referees; judicial officers. Only judges should perform judicial case decision-making functions." IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, COURT ORGANIZATION AND ADMINISTRATION, at 21 (1977).

Both groups adopting the position calling in effect for the abolition of juvenile court referees noted that, although referees are indeed helpful in relieving overburdened juvenile court judges, they also symbolize the lowered status of the juvenile courts. Hoping to overcome this problem and the possibility of inferior quality referees, the standards opt for their elimination.

The IJA/ABA Standard also allude to the possibility that the use of referees may actually have an inverse impact on judicial economy in states in which the judge must review each recommendation. This may result in the referee functioning as the judge, consequently setting up a double jeopardy challenge similar to this case. IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, COURT ORGANIZATION AND ADMINISTRATION, at 23 (1977).

The various groups which have undertaken to establish model standards and practices for juvenile court operation are aware of both the problems existing in the courts and the practicalities affecting their functioning. Cognizant of the limited resources of most courts utilizing referees, it is nevertheless that they have become an unworthy method of replacing judges in juvenile courts. For this reason recent standards call for the elimination of their use; alternatively if we permit them to function in this manner their findings must be accorded the full weight of an adjudication with double jeopardy applied to it.

III. **In Many of the States Where Referees Are Used the Statutory Provisions and Practice Avoid the Double Jeopardy Claim Presented by This Case.**

Of the fifty-one jurisdictions surveyed[14] only thirty-four[15] presently have statutory provisions for the use of referees, masters or other subjudicial officers[16] in juvenile or family courts. These figures are subject to frequent change, as some states have recently acted to eliminate the use of referees,[17] while others have severely limited their use,[18] or through other methods have attempted to remove the distinctions between the referee and the judge.[19]

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[14] Codes of all fifty states and the District of Columbia were considered.

[15] ALA. CODE tit. 13, §357 (1959); ARIZ. REV. STAT. §8-231 (Supp. 1977); ARK. STAT. ANN. §45-408 (1977); CAL. WELF. & INST. CODE § 247 (West. Supp. 1977); COLO. REV. STAT. §19-1-110 (1974); DEL. CODE tit. 10, §913 (1975); GA. CODE ANN. §24-A-701 (1976); IDAHO CODE §16-1843 (Supp. 1977); IND. CODE ANN. §33-12-2-17 (Burns Supp. 1977); IOWA CODE ANN. §231.3 (1977); KAN. STAT. ANN. §20-310a (Supp. 1977); KY. REV. STAT. ANN. §24A.100 (Baldwin Supp. 1977); LA. REV. STAT. ANN. §13:1580.1 (West 1968); MD. RULES OF PROC. 911 (1977); MICH. COMP. LAWS ANN. §712A.10 (1968); MINN. STAT. ANN. §260.031 (West 1971); MISS. CODE ANN. §43-21-29 (Supp. 1977); MO. REV. STAT. §211.023 (Supp. 1978); NEB. REV. STAT. §43-236.01 (1974); NEV. REV. STAT. §62.090 (1977); N.J. STAT. ANN. §2A:4-12 (West 1952); N.D. CENT. CODE §27-20-07 (1974); OHIO REV. CODE ANN. §2151.16 (1976); OKLA. STAT. ANN. tit. 10 §1126 (1977); OR. REV. STAT. §419.581 (1975); PA. STAT. ANN. tit. 11 §50-301 (Purdon Supp. 1977); R.I. GEN. LAWS §8-10-3 (Supp. 1976); S.C. CODE §15-1120 (1962); TENN. CODE ANN. §37-207 (1976); TEX. FAM CODE ANN. tit. 3, §54.10 (1976); UTAH CODE ANN. §78-3a-14 (1977); WASH. REV. CODE ANN. §13.04.030 (1962); W.VA. CODE §49-5A-1 (Supp. 1977); WYO STAT. §14-115.11 (1971).

[16] The names for these officers does vary among the states: Idaho denominates its officers as "magistrates"; Kansas uses the term "judges pro tem"; and South Carolina employs "Associate Judges."

[17] *E.g.*, VA. CODE §16.1-144 (1960) (repealed 1972); and HAW. REV. STAT. §571-7 (1959) (repealed 1973).

[18] In Kentucky the use of trial commissioners is limited to those counties in which there is no resident district judge, a provision which eliminates their use in all of the major metropolitan areas where they had been heavily utilized. KY. REV. STAT. ANN. §24A.-100 (Baldwin Supp. 1977).

[19] *Compare* KAN. STAT. ANN. §38-804 (1973 (repealed 1976) *with* KAN. STAT. ANN §20-310a (Supp. 1977). The current statute adds the requirement that the judge pro tem be an attorney, and removes the earlier per diem pay rate of twenty-five dollars.

The double jeopardy problems raised in the instant case will naturally occur only where referees conduct the full range of judicial hearings in delinquency cases including adjudications and dispositions. Significantly, five of the states included within the above thirty-four severely limit the type of hearings to be conducted by masters. In Rhode Island masters are only permitted to assist judges in matters pertaining to delinquent support payments.[20] Louisiana restricts its referees to the adjudication and disposition of traffic violations by children.[21] Kentucky, West Virginia and Wyoming permit detention hearings and other preliminary matters to be heard by referees, but specifically bar them from conducting hearings on the merits of the case.[22] Thus in none of these five states could the problems presented to the Court by this case have occurred.

As discussed in Section I of this brief, in those states in which the child is afforded the right to a hearing by a judge the difficulties presented by Maryland Rule 911(c) are likewise avoided. Six[23] of the earlier thirty-four states contain this protection.

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[20] R. I. GEN. LAWS §8-10-3 (Supp. 1976).

[21] LA. REV. STAT. ANN. §13:1580.1 (West. 1968).

[22] West Virginia specifies that "[i]t shall be the duty of the referee to hold any detention hearing . . . Each referee shall also perform such other duties as are assigned to him by the court . . . Referees shall not be permitted to conduct hearings on the merits of any case." W.VA. CODE §49-5A-1 (Supp. 1977). Wyoming directs "[i]n the absence or incapacity of the judge, the detention or shelter care hearing shall be conducted by a district court commissioner . . . a commissioner may issue subpoenas or search warrants, order physical or medical examinations, authorize emergency medical, surgical or dental treatment . . . but a commissioner shall not make final orders of adjudication or disposition." WYO. STAT. §14-115.11 (1971). *See also, Kentucky Rules of the Supreme Court,* Rule 5.030 (b) (West. 1977), for the similar limitations on trial commissioners acting in juvenile cases.

[23] Colorado: COLO. REV. STAT. §19-110(3) (1974); Georgia: GA. CODE ANN. §24-A-701(b) (1976); Michigan: MICH. COMP. LAWS ANN. §712A.10 (1968); North Dakota: N.D.

Georgia's provision is typical of the right afforded the child: "Before commencing the hearing, the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party so requests, the hearing shall be conducted only by the judge." GA. CODE ANN. § 24A-701(b)(1976). Thus six additional states have protected themselves from the double jeopardy claim presented by this case.

At least four other states are immune from the instant attack, since they do not permit the state to take exception to the findings of the referee. Both Alabama and Minnesota only permit the child, parent, guardian or custodian to request a review before the judge,[24] while California and Missouri would also permit the judge to review the case *sua sponte*.[25] Therefore in these jurisdictions a state would be unable to seek review of a finding of non-delinquency by the referee.[26]

Finally, there are two other states, Arkansas and Kansas,[27] where the findings of the referee appear to be given the same

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CENT. CODE §27-20-07 (1974); Pennsylvania: PA. STAT. ANN. tit. 11, §50-301 (Purdon Supp. 1977); and Texas: TEX. FAM. CODE ANN. tit. 3, §54.10 (1976).

[24] ALA. CODE tit. 13, §357 (1959); MINN. STAT. ANN. § 260.031 (West 1971). *See also,* DEL. CODE tit. 10, §913 (1975), which would permit a request for review to be made by a probation officer if no custodian, adult friend or attorney for the child was present at the hearing.

[25] CAL. WELF. & INST. CODE §247 (West Supp. 1977); MO. REV. STAT. §211.029 (Supp. 1978).

[26] *But see, Jesse W. v. San Mateo Superior Court,* No. SF-23580 S. Ct. Cal. (*cert. granted,* Dec. 26, 1976), a case currently pending before the California Supreme Court which argues that even this limited type of review is prohibited by the double jeopardy protections.

[27] ARK. STAT. ANN. §45-408 (1977); KAN. STAT. ANN. §20-310a (Supp. 1977).

effect as that of the juvenile court judge. In these jurisdictions no mention is made in the statute of any review or rehearing provisions before the juvenile judge. The Arkansas statute explicitly states that "[t]he decisions of the juvenile referee shall be binding upon the county judge, who shall sign any order or judgment delivered by the juvenile referee, and such order or judgment shall be a decision of the county judge."[28] Provisions found in the Kansas code are similar, explaining only that:

> Any judge pro tem appointed pursuant to this section shall have the full power and authority of a district judge with respect to any actions or proceedings before such judge pro tem except that any judge pro tem appointed pursuant to subsection (d) shall have only such power and authority as provided therein.[29]

Of the thirty-four jurisdictions which now utilize referees in juvenile court proceedings, at most seventeen may present the possibility of double jeopardy violations similar to those posed by Maryland Rule 911(c). Since it is often difficult to determine from the literal statutory scheme just how procedures are implemented, there may be other jurisdictions in which the state by practice is not permitted to ask for a rehearing of a referee's finding of innocence. Perhaps this may explain why there have been no similar reported challenges to this type of procedure from other jurisdictions.

While *amicus* realizes that to strike down this procedure in Maryland may influence practices across the country, given the relatively small number of states in which such abuses could occur and the fact that states are now retreating from the use of subjudicial decision makers, this Court should not hesitate to act.

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[28] ARK. STAT. ANN. §45-440 (1977).

[29] KAN. STAT. ANN. §20-310a(c) (Supp. 1977).

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the judgment of the district court.

Respectfully submitted,

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National Juvenile Law Center

CERTIFICATE OF SERVICE

I, David C. Howard, Counsel for *Amicus Curiae*, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, February 21, 1978, three copies of Brief of *Amicus Curiae* to Clarence W. Sharp, Assistant Attorney General for the State of Maryland, Counsel for Appellants William Swisher, et al., at 1 S. Calvert Street, Baltimore, Maryland 21202, and Peter Smith, Maryland Juvenile Law Clinic, Counsel for Appellees Donald Brady, et al., at 500 W. Baltimore Street, Baltimore, Maryland 21201. I further certify that all parties required to be served in this appeal have been served.

DAVID C. HOWARD
Counsel for *Amicus Curiae*

APPENDIX

APPENDIX A

Standard Juvenile Court Act

Section 7

The judge, or senior judge if there is more than one, may appoint suitable persons trained in the law, to act as referees, who shall hold office during the pleasure of the judge. The judge may direct that any case, or all cases of a class or within a district to be designated by him, shall be heard in the first instance by a referee in the manner provided for the hearing of cases by the court, but any party may, upon request, have a hearing before the judge in the first instance. At the conclusion of a hearing the referee shall transmit promptly to the judge all papers relating to the case, together with his findings and recommendations in writing.

Written notice of the referee's findings and recommendations shall be given to the parent, guardian, or custodian of any child whose case has been heard by a referee, and to any other parties in interest. A hearing by the judge shall be allowed if any of them files with the court a request for review, provided that the request is filed within three days after the referee's written notice. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee, provided that new evidence may be admitted in the discretion of the judge. If a hearing before the judge is not requested or the right to the review is waived, the findings and recommendations of the referee, when confirmed by an order of the judge, shall become the decree of the court.

APPENDIX B

Uniform Juvenile Court Act

Section 7

(a) The judge may appoint one or more persons to serve at the pleasure of the judge as referees on a full or part-time basis. A referee shall be a member of the bar [and shall qualify under the civil service regulations of the County]. His compensation shall be fixed by the judge [with the approval of the [governing board of the County] and paid out of [. . . . .]].

(b) The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee in the manner provided by this Act. Before commencing the hearing the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearing shall be conducted by the judge.

(c) Upon the conclusion of a hearing before the referee he shall transmit written findings and recommendations for disposition to the judge. Prompt written notice and copies of the findings and recommendations shall be given to the parties to the proceeding. The written notice also shall inform them of the right to a rehearing before the judge.

(d) A rehearing may be ordered by the judge at any time and shall be ordered if a party files written request therefor within 3 days after receiving the notice required in subsection (c).

(e) Unless a rehearing is ordered the findings and recommendations become the findings and order of the court when confirmed in writing by the judge.

APPENDIX C

Model Acts for Family Courts and State-Local Children's Programs

Section 4

(a) The ( )[9] may appoint one or more persons to serve as referees on a full- or part-time basis. They shall be members in good standing of the bar of this State. Their compensation shall be fixed by the ( )[9] with the approval of the ( )[10] and paid out of the general revenue funds of the ( ).[11]

(b) Delinquency and neglect hearings shall be conducted only by a judge if:

(1) the allegations set forth in the neglect or delinquency petition are denied;

(2) the hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or

(3) a party objects to the hearing being held by a referee.

Otherwise, the ( )[9] may direct that hearings in any case or class of cases shall be conducted in the first instance by a referee in the manner provided for by this (act).

(c) Upon the conclusion of a hearing before a referee, he shall transmit his findings and recommendations for disposition in

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[9] Insert title of chief judge of court of highest general trial jurisdiction.

[10] Insert appropriate budgetary authority.

[11] Insert appropriate source of funds.

writing to the judge. Prompt written notice of the findings and recommendations together with copies thereof shall be given to the parties to the proceeding. The written notice shall also inform them of the right to a rehearing before the judge.

(d) A rehearing may be ordered by the judge at any time and shall be ordered if any party files a written request therefor within 3 days after receipt of the referee's written notice. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee, provided that new evidence may be admitted in the discretion of the judge.

(e) If a hearing before the judge is not requested or ordered, or the right thereto is waived, the findings and recommendation of the referee, when confirmed by an order of the judge, shall become the decree of the court.
